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April 4, 2013

Notice of Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: *In the Matter of Petitions for Waiver of Commission's Rules Regarding Access to Numbering Resources*, CC Docket 99-200; *Connect American Fund, et al.*, WC Docket No. 10-90; GN Docket No. 09-51; WC Docket No. 07-135; WC Docket No. 05-337; CC Docket No. 01-92; CC Docket No. 96-45; WC Docket No. 03-109; WT Docket No. 10-208; *Technology Transitions Task Force*, GN Docket No. 13-5

Dear Ms. Dortch:

On April 2, 2013, John Murdock, President, Bandwidth.com, Inc.; Michael Shortley, III, Vice President, Legal, Andrea Pierantozzi, Vice President, Voice Services, and Joseph Cavender, Vice President, Federal Regulatory Affairs, Level 3 Communications, LLC; and the undersigned ("CLEC Participants") met with Priscilla Delgado Argeris, Legal Advisor to Commissioner Rosenworcel. In the meeting, the CLEC Participants reiterated their significant concerns regarding the series of voice over Internet protocol ("VoIP") provider ("Petitioners") petitions seeking limited waiver of Section 52.15(g)(2)(i) to obtain direct access to number resources.

If the Commission were to proceed with the proposed orders as described to Bandwidth and Level 3, there are considerable risks that these orders would unintentionally predetermine a wide range of matters regarding the communication industry's transition from the PSTN-based regulatory regime to a new framework for IP technologies ("IP Transition") without conducting a transparent rulemaking. IP Transition issues must be considered in conjunction with the *Connect America Fund* FNPRM, and the NTCA and AT&T IP Interconnection Petitions, which fundamentally address the exact same issues that are related to a decision to grant non-carriers rights as if they were telecommunications carriers. By moving forward with an *ad hoc* trial that does not appear to be structured in a manner that will be beneficial or relevant to an NPRM in this proceeding, the Commission stands to lose the ability to address IP interconnection and other transition issues comprehensively and holistically after notice and comment from all interested parties.

As Commissioner Adelstein said in 2005:

> Addressing this petition through the IP-Enabled Services rulemaking would allow the Commission to consider more comprehensively the number conservation, intercarrier compensation, universal service, and other issues raised by commenters in this waiver proceeding. It would also help address commenters' concerns that we are setting IP policy on a business plan-by-business plan basis rather than in a more holistic fashion.[1]

The Commission should heed Commissioner Adelstein's advice and conduct such a rulemaking proceeding before any further waivers, including the Vonage waiver, are granted. Vonage's request is not a one-off request. Rather, what Vonage seeks is a new paradigm to govern access to numbers. The purpose of notice-and-comment rulemaking under the APA is precisely to ensure that issues like these are decided—with appropriate deliberation, on a full record, and in a context in which all interested parties have appropriate notice of the scope of what is being considered—so that likely regulatory and operational complications are fully considered before business plans are launched and consumers are directly impacted. Indeed, the changes contemplated by the Commission in these proceedings could undermine core principles of the Telecom Act, and would replace decades of common carrier regulation with what amounts to little more than a hope that all will go well.

A Vonage "trial" should not take place simultaneously with the NPRM. The Commission should first issue an NPRM because it has never taken public notice and comment on the issue of whether it is advisable to issue number resources directly to non-carrier providers. The Commission should seek comment, in an NPRM, on the appropriate terms for such a trial, if the Commission believes such a trial would be warranted. Indeed, principles of transparency and due process require that that *all* interested parties have an opportunity to comment, in response to a specific notice of proposed rulemaking, on how such a trial should be conducted.

If, however, the Commission finds that a trial will assist its consideration of the issues raised in the NPRM (and without waiving our arguments immediately above), it follows that the Commission should require participants in any trial to produce reports on their experiences to inform the Commission's deliberation of whether or how non-carriers could legally and operationally utilize number resources directly. As part of their reports, providers should, at a minimum, be required to (1) describe and quantify the problems they experience routing calls, including, for example, call-completion and post-dial delay issues; (2) describe and quantify any issues with porting telephone numbers in or out; (3) fully detail any intercarrier compensation disputes; (4) publicly disclose any IP interconnection agreements that any trial participant enters into (and with who) during the period of the trial along with the material terms, including rates,

[1] *See* Concurring Statement of Commissioner Jonathan S. Adelstein. *Administration of the North American Numbering Plan*, Order, 20 FCC Rcd. 2957 (2005).

of those agreements; and (5) certify the number of numbers they have used, by type (new or ported) and by rate center; and their utilization factors. Such reports should be generated and filed at least quarterly and any reports generated as part of the trial should be made a part of the public record in this proceeding for all interested parties to review and comment upon, well in advance of the Commission making any changes to its rules.[2] Indeed, the D.C. Circuit has emphasized that "studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment."[3]

It is not sufficient for the Commission merely to include data or reports in the record. The Commission must make the information public and provide notice and comment on that information. The CLEC Participants are concerned that, if the trial(s) are conducted in parallel with a rulemaking, there will not be an opportunity for notice and comment on all information considered as part of the rulemaking.[4]

While CLEC Participants have consistently highlighted the discriminatory nature of granting independent waiver petitions, they've also expressed their concern with any Commission order that would invite additional companies to seek permission from the Wireline Competition Bureau to engage in additional trials before a rulemaking is completed. The Commission runs the risk of putting multiple providers into trials, potentially establishing hundreds of thousands of active phone numbers for a year or longer, without having established any rules to govern such traffic and the utilization (or lack thereof) of the affected numbers. The carrier-based system in place today requires carriers to demonstrate to state commissions that they have the technical, managerial, and financial capacity to provide telecommunications services to the public before access to numbering resources is allowed. Further, enabling multiple trials on separate schedules or terms would become unmanageable and risk undermining the supposed value of them at the outset.

Because CLEC Participants understand the proposed orders would initiate trials before completing a rulemaking, no legal standard by which providers are qualified to offer service is ever established. Due process requires that the Commission first establish a standard as to what qualifies Vonage or any other provider, to obtain waiver requests. It continues to be unclear what "special circumstances" set Vonage or any other carrier apart in this context. Presumably, the Commission could approve some providers, and reject others. Providers should have a full

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[2] *See Amer. Radio Relay League v. FCC*, 524 F.3d 227, 236-37 (D.C. Cir. 2008).
[3] *American Radio Relay League*, 524 F.3d at 236-37 (internal citations omitted).
[4] *Id.* (internal citations omitted) ("It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data, or on data that, [to a] critical degree, is known only to the agency. Where, as here, an agency's determination 'is based upon 'a complex mix of controversial and uncommented upon data and calculations,' there is no APA precedent allowing an agency to cherry-pick a study on which it has chosen to rely in part."). *See also Chamber of Commerce v. SEC*, 443 F.3d 890, 899-901 (D.C. Cir. 2006) ("The purpose of enforcing the APA's notice and comment requirements ensures that an agency does not fail to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary so that a genuine interchange occurs. . . .").

understanding going into the process of the legal standard against which they are being judged. It also appears that the proposed orders would delegate this non-standards based inquiry to the Bureau. As such, the Commissioners will not even review the qualifications of applicants, and it will be left to the Bureau to decide which providers can participate in the trials. Without crystal clear guidelines, this approach runs the risk of discriminatory determinations if some applications are granted and some are refused, or, worse, to avoid that potential discrimination, determinations that everyone, regardless of their qualifications, has their application granted. At a minimum, providers seeking a waiver should be required to demonstrate that they have the managerial, financial, and technical ability to route calls before they could be granted a waiver. Additionally, in the absence of any rules adopted, after notice and an opportunity to comment, to govern the trial, such waiver petitions should be evaluated by the full Commission, rather than the Bureau.

Finally, in addition to these fundamental procedural flaws the CLEC Participants urged Commissioner Rosenworcel to ensure that the NPRM itself is conducted in a manner that is not biased towards giving non-carriers direct access to numbers as a long-term policy. There are already a myriad of Consumer Protection, Interconnection and Intercarrier Compensation issues within the industry as it relates to the rules that apply to VoIP traffic. Signaling in any way to the industry that the Commission has ceded its and the states' historic regulatory oversight of voice communications will almost assuredly result in a "race to the bottom" where all providers seek to create perceived advantages, while sacrificing consumer rights, competitive equity and universal service obligations. The Commission must not rush to judgment on these issues critical to the IP Transition. Rather, a well-planned and thoughtful look at the critical issues that are inextricably tied to utilization of North American telephone numbering resources is required. Unfortunately however, rushing to vote on the proposals as has been described to CLEC Participants two weeks from today would not be well-planned and thoughtful.

As required by Section 1.1206(b), this *ex parte* notification is being filed electronically for inclusion in the public record of the above-referenced proceedings. If you have any questions or require additional information, please do not hesitate to contact me at 202.659.6655.

Sincerely,

/s/
James C. Falvey
Counsel for CLEC Participants

cc: Commissioner Rosenworcel
Priscilla Delgado Argeris